AWS entrants for the same costs.[150]

62. We adopt a policy affirming the tentative conclusion made in the *June 2009 Further Notice* that Sprint Nextel may not both receive credit in the 800 MHz true-up and receive reimbursement from the MSS and AWS entrants for the same costs. This has been the rule since the cost sharing requirements were adopted in the *800 MHz R&O*, and is necessary to prevent Sprint Nextel from receiving an unjustified windfall, and no party has objected to this conclusion. We believe that this requirement will be easy to implement. If the true-up occurs after Sprint Nextel has received reimbursement from one or more of the other new entrants, the *800 MHz R&O* requires that the Sprint Nextel report to the 800 MHz Transition Administrator the amount received from the other entrants.[151] As a result, the Transition Administrator will ensure that Sprint Nextel does not receive credit against any potential windfall payment for costs for which it has received reimbursement. If the true-up occurs prior to Sprint Nextel receiving reimbursement from another entrant, we will require Sprint Nextel to inform the other entrant of the expenses for which it has received credit in the 800 MHz true-up prior to receiving reimbursement. The other entrant will not be obligated to reimburse Sprint Nextel for what would otherwise be its share of those particular expenses. These requirements should insure, in the interest of fairness, that Sprint Nextel does not make a double recovery.

63. The principle that Sprint Nextel is not entitled to make a double recovery also applies to reimbursements it receives from among the new entrants. We recognize that multiple new entrants may have an interest in the same portion of the relocated BAS spectrum because, for example, entrants change business structure or assign their licenses. Accordingly, we specify that Sprint Nextel is not entitled to obtain reimbursement from a new entrant for relocation costs that Sprint Nextel has already received from another new entrant. Thus, if a new entrant assigns its license to a third party after the new entrant has reimbursed Sprint Nextel, we would reject a claim that the assignee is responsible for reimbursing Sprint Nextel for that same relocation expense.[152] The converse also holds: an assignee would be considered a new entrant and is responsible for unpaid cost sharing associated with a particular portion of the spectrum. However, to the extent that a new entrant seeks to assign its license to a third party prior to satisfying its reimbursement obligation, the assignor and assignee would be jointly and severally liable for the reimbursement costs until paid.[153] This approach is both consistent with the overarching *Emerging Technologies* principles and also furthers the public interest by preventing Sprint Nextel from receiving an unjustified windfall while precluding new entrants that incurred a reimbursement obligation from evading the payment of that obligation by entering into transactions with third parties.

64. As for when Sprint Nextel should be reimbursed by the other new entrants for its BAS relocation cost, we will not adopt either of the proposals on which we sought comment on the *June 2009*

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[150] *June 2009 Further Notice* at ¶ 84.

[151] *800 MHz R&O* at ¶ 330.

[152] Similarly, were we to permit an MSS entity operating in the 2 GHz band to separate its rights into distinct components (such as by allowing a third party to deploy ATC), we would bar Sprint Nextel from obtaining more than one reimbursement for the same costs from the various new entrants.

[153] The assignee would be considered a new entrant and jointly and severally liable for unpaid cost sharing associated with a particular portion of the spectrum. Although parties to such transactions may enter into specific agreements between each other with respect to the payment of reimbursement costs, such an agreement will not preclude Sprint Nextel from seeking to collect the appropriate reimbursement from the parties or in any way limit the Commission's authority to take appropriate enforcement action against the parties to the transaction for failure to timely pay their reimbursement obligation. We do not here address whether the Commission may be required to modify application of this joint and several liability rule in particular cases consistent with the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

Further Notice.[154] Both of the proposals would have required the establishment of multiple payment deadlines and the calculation of relocation costs on a market-by-market basis. None of the commenting parties supported either of these proposals, and all of the parties addressing this issue support having a single deadline.[155] In the interest of ease of implementation, we conclude that specific reimbursement deadlines tied to the conclusion of the BAS transition would be more appropriate than a series of deadlines for different markets that depend on when each of the markets transition.

65. We conclude that the reimbursement deadline for a new MSS or AWS entrant will be based on when the new entrant has "entered the band." Once the new entrant has entered the band, but no later than the sunset date, Sprint Nextel may provide the new entrant with the required documentation and request payment (as discussed further below). The new entrant will then have thirty days to submit its reimbursement to Sprint Nextel, unless, as described below, the parties agree to different terms (such as an installment plan).[156] This approach avoids complexities of administering separate deadlines for each market and provides certainty to the parties.

66. DBSD argues that MSS entrants should be able to make payments under an installment payment plan.[157] DBSD believes that requiring a significant lump-sum payment will create an unwarranted hurdle to MSS operators introducing commercial service.[158] Sprint Nextel opposes allowing MSS entrants to make payments using an installment plan because this would make Sprint Nextel a creditor of the MSS entrants.[159] We will not require, nor will we object if parties agree to, an installment payment plan for BAS relocation reimbursement. We recognize that the lack of a revenue stream means that MSS and AWS entrants may have limited financial resources to satisfy their cost-sharing reimbursement obligation at the time when it is due.[160] But, as Sprint Nextel has noted, an installment plan carries some risk to the party owed payment.[161] Further, because none of the parties has suggested what form an installment payment plan should take – *i.e.,* at what intervals payments should be made and for what length of time – we have no record on which to adopt a specific installment payment plan.

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[154] *June 2009 Further Notice* at ¶¶ 97-98. One proposal would have tied reimbursement of all then-relocated BAS markets to a later entrant's date of band entry, with additional payments due after each subsequent BAS market transition. The other would have allowed MSS entrants to pay their share of relocation costs only for those markets where they chose to operate and sought comment on how to structure reimbursement for the remaining markets.

[155] *See, e.g, Sprint Reply* at 12. *TerreStar Comments* at 21-23; *TerreStar Reply* at 9-11; *DBSD Comments* at 20; *DBSD Reply* at 10.

[156] To avoid potential confusion, we further clarify that, so long as the party who has relocated the incumbents provides the new entrant with the required documentation and requests payment by the sunset date, the sunset date will not serve to extinguish the new entrant's payment obligation that is described in the documentation. If the documentation and payment request is submitted after the sunset date, then operation of the sunset date will end any reimbursement obligation that the new entrant otherwise would have had.

[157] *DBSD Comments* at 20.

[158] *Id.*

[159] *Sprint Reply* at 12; *Sprint Comments* at n.30.

[160] Under the reimbursement plan we are adopting, future AWS entrants may have to satisfy their reimbursement obligation as early as 30 days after grant of their long form application. The amount owed should be known prior to auction, so AWS applicants can take this into account when they file applications and bid for licenses (we expect Sprint Nextel to make these costs available upon reasonable request). Because MSS entrants are only required to reimburse Sprint Nextel a *pro rata* share of the cost of relocating BAS incumbents in the thirty largest markets and all fixed BAS links, their relocation expenses are comparable to the expenses they would have had to incur before beginning operations when the band was solely allocated to MSS.

[161] This risk is not merely speculative, as DBSD argues that its cost sharing obligation to Sprint Nextel is subject to its bankruptcy proceeding.

Instead, we encourage the parties interested in making installment payments to use the 30-day payment window to negotiate an appropriate installment payment plan. Nevertheless, if no installment plan is agreed upon, a new entrant must pay the full cost sharing amount in one payment at the reimbursement deadline.

67. We see no reason to link the payment of new entrants' cost sharing obligations to the true-up as the MSS entrants have suggested. When the *800 MHz R&O* was adopted in 2004, the BAS relocation cost sharing was linked to the true-up because the 800 MHz band reconfiguration and BAS relocation were expected to be completed relatively close in time and Sprint Nextel was expected to take credit for at least some of the BAS relocation costs in the 800 MHz true-up. Now, the BAS relocation is complete, while the end date of the 800 MHz band reconfiguration remains uncertain. The true-up, currently scheduled to occur by December 31, 2010, may be postponed further given that the 800 MHz band reconfiguration will likely not be complete by that date. Accordingly, we do not think it would be prudent to introduce the uncertainty associated with the true-up date to the payment date of the BAS cost sharing, especially given that we have prohibited Sprint Nextel from both claiming credit for BAS relocation costs against the anti-windfall payment and receiving cost sharing payments from new entrants for the same costs.

68. As we proposed in the *June 2009 Further Notice*, we will require that Sprint Nextel share with any other entrant from whom it seeks reimbursement its relocation cost as documented in its annual audit as provided to the transition administrator.[162] In addition, we will require Sprint Nextel to produce copies of third-party audited statements of expenses associated with the BAS relocation. We will further require Sprint Nextel to produce copies of the frequency relocation agreements that it has made with any BAS incumbent for which it is seeking cost sharing.[163] As discussed above, the new entrant will have 30 days, unless other terms are agreed upon, to make its reimbursement payment after Sprint Nextel has provided this documentation.[164]

69. The MSS entrants have requested the ability to examine and contest individual expenses while Sprint Nextel has expressed concern that the MSS entrants are merely trying to delay or limit their cost sharing obligations.[165] The fact that the new entrants from which Sprint Nextel requests cost sharing will have copies of the frequency relocation agreements and third party audited expense statements will help ensure that the relocation costs are legitimate. Moreover, in negotiating the frequency relocation agreements, Sprint Nextel had every reason to keep the frequency relocation costs low because it would be paying the portion of the cost associated with its 5 megahertz of spectrum, faces uncertainty as to whether any AWS licensees will enter the band in time to share in the costs, is limited to MSS contributions for only the top 30 markets and all fixed links, and now is unlikely to obtain credit for these costs against the anti-windfall payment. With regard to disputes that may arise with either MSS entrants or future AWS entrants, we note that parties have several options to resolve disputes that may arise including mediation, arbitration, or pursuing civil remedies in the court system. Parties contesting a specific cost sharing obligation shall provide evidentiary support to demonstrate that their calculation is reasonable and made in good faith; specifically, they are expected to exercise due diligence to obtain the

[162] *June 2009 Further Notice* at ¶ 99.

[163] The MSS entrants are only required to share in the cost of relocation BAS incumbents in the 30 largest markets and all fixed BAS links. *800 MHz R&O* at ¶ 261. Consequently, there is no need for Sprint Nextel to share frequency relocation agreements and expense statements for BAS incumbents in the smaller markets if the BAS incumbents have no fixed links.

[164] Should the parties mutually agree to the submission of lesser documentation, the 30-day period and payment deadline will take effect as described above.

[165] *TerreStar Comments* at 21-22; *TerreStar Reply* at 9-11; *DBSD Comments* at 23; *Sprint Reply* at 13-15.

information necessary to prepare an independent estimate of the relocation costs in question.[166]

70. We do not adopt the proposal in the *June 2009 Further Notice* to allow Sprint Nextel to recover relocation costs associated with all 20 megahertz of MSS spectrum from a single MSS entrant.[167] Sprint Nextel supports the Commission's proposal because it will help ensure it is fully reimbursed for its efforts, rather than continuing to carry the burden for MSS operators that attempt to avoid their reimbursement obligations.[168] Sprint Nextel also argues that each MSS operator should be responsible for funding the entire MSS share and notes that there is a true-up mechanism by which the MSS operators can settle among themselves after the BAS transition is complete. TerreStar responds that giving Sprint Nextel this right would unfairly shift the risk of collection of BAS relocation expenses from Sprint Nextel, who took the risk when it agreed to pay up front for the BAS relocation, to MSS operators.[169] DBSD argues that there is no reasonable basis for adopting the proposal because both MSS operators have launched satellites and will have access to their respective portion of the band.[170]

71. In reaching our decision, we observe that the Commission's *Emerging Technologies* policies allow an earlier entrant who has relocated incumbents from spectrum that benefits a later entrant to recover costs from the later entrant. The amount that the earlier entrant could recover has always been based on the amount of the later entrant's spectrum that the earlier entrant has cleared.[171] In addition, there has never been any guarantee to a band clearing entrant that it will receive cost sharing because later new entrants might not incur a band clearing responsibility before the sunset date. We conclude that we should not depart from these traditional *Emerging Technologies* policies. While doing so might shift risk from the band clearing party, we cannot conclude that desire to balance the interests of all parties necessitates such action. In addition, we must recognize that the cost sharing obligations of the MSS entrants are complicated by the DBSD bankruptcy proceeding. For these reasons, we will keep the cost sharing obligations of each MSS entrant to Sprint Nextel separate and distinct.

72. As to future AWS entrants, we adopt rules consistent with the tentative conclusion the Commission made in the *June 2009 Further Notice* that the future AWS licensees that enter the band prior to the sunset date will be responsible for reimbursing Sprint Nextel for relocating the BAS incumbents, less any BAS relocation costs for which Sprint Nextel had received credit against the anti-windfall payment. This conclusion is consistent with our past actions in this proceeding and with our traditional *Emerging Technologies* policies. However, as we noted in the *June 2009 Further Notice*, determining how to apportion the relocation cost among the future AWS licensees will have to wait until the licensing scheme for the AWS licensees is adopted.[172] Apportioning the cost among the AWS

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[166] These dispute resolution procedures for cost sharing among new entrants are consistent with those applicable to MSS and AWS entrants in the 2110-2150 MHz and 2160-2200 MHz bands, which are the bands being cleared of fixed incumbents to accommodate the 2 GHz MSS downlink as well as AWS operations in those bands. *See* 47 C.F.R. § 27.1172.

[167] *June 2009 Further Notice* at ¶ 87.

[168] *Sprint Comments* at 19-20; *Sprint Reply* at 16.

[169] *TerreStar Comments* at 20.

[170] *DBSD Comments* at 25.

[171] Even when this band was to be used solely by MSS entrants, later entering MSS operators were only required to reimburse an earlier entrant that cleared spectrum a *pro rata* share of the earlier MSS entrants' band clearing costs, with a final "true-up" designed to ensure that all MSS entrants ultimately paid a proportional share of total expenses. *June 2009 Further Notice* at ¶ 87. Thus, while Sprint Nextel notes the MSS "true-up" feature associated with MSS-to-MSS reimbursement, we conclude that it should not be used to overshadow the *pro rata* aspect of the reimbursement scheme.

[172] *Id.* at ¶ 88.

licensees will depend on whether the licenses are issued for geographic areas or on a nationwide basis, whether the geographic boundaries of AWS licenses coincide with BAS markets, how much spectrum each licensee is assigned, and the extent to which Sprint Nextel takes credit for some of the BAS relocation cost in the 800 MHz true-up. We intend to adopt specific cost sharing rules, consistent with this Order, to govern the cost-sharing process between Sprint Nextel and AWS entrants in the 1995-2000 MHz and the 2020-2025 MHz bands, when we adopt service rules which define the licensing scheme for these bands.

73. In the *June 2009 Further Notice*, the Commission sought comment on what actions it should take if MSS entrants fail to make the required reimbursement payments.[173] Sprint Nextel argues that failure of an MSS entrant to pay its cost sharing obligation in a timely fashion should automatically result in the suspension of its right to operate and suspension of its license if the failure to pay continues.[174] TerreStar responds that the Commission has ample means to penalize licensees under its rules and that any failure to make payments should be addressed based on the facts and circumstances at play.[175] We will adopt no specific policies or procedures as to how we should proceed if later new entrants fail to reimburse an earlier entrant for the cost of relocating BAS incumbents as required. Instead, we will address complaints regarding failure to make required payments that are filed before the Commission through our existing enforcement mechanisms.[176]

5. The Automatic Stay of Section 362 of the Bankruptcy Code

74. DBSD has filed a petition to stay the rulemaking proposed in the *June 2009 Further Notice* on the grounds that the rulemaking must be automatically stayed under Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a).[177] DBSD claims that the automatic stay provision of the Bankruptcy Code applies here because the rulemaking directly involves Sprint Nextel's band-clearing reimbursement claims against DBSD, and because Sprint Nextel is using the proceeding to attempt to obtain possession of property from DBSD's estate. Sprint Nextel opposes DBSD's petition. It claims that the *June 2009 Further Notice* is not an adjudication of a dispute between DBSD and Sprint Nextel, and notes that the law has long recognized a difference between rulemaking and adjudication for purposes of the automatic stay.[178] We find DBSD's arguments misplaced, and deny its petition for stay.

75. The automatic stay of the Bankruptcy Code, 11 U.S.C. § 362(a), essentially bars actions against the debtor to recover a pre-petition claim against the bankruptcy estate or to obtain possession or exercise control over property of the estate. The regulatory exception to the automatic stay, 11 U.S.C. § 362(b)(4), excepts from the automatic stay actions taken pursuant to a government unit's or organization's police or regulatory powers, including enforcement of a judgment other than a money judgment.[179] The

[173] *June 2009 Further Notice* at ¶ 98.

[174] *Sprint Comments* at 15. Sprint Nextel also notes that it reserves the right to seek recovery in court, separate from Commission proceedings.

[175] *TerreStar Reply* at 12.

[176] As is the case in our *Emerging Technologies* proceedings, "we emphasize that we intend to use the full realm of enforcement mechanisms available to us in order to ensure that reimbursement obligations are satisfied." *Cost Sharing First R&O* at ¶ 80.

[177] *DBSD Petition* at 2; *Also see DBSD Comments* at 3-9.

[178] *Sprint Opposition* at 2-4; *Also see Sprint Reply* at 2-3.

[179] 11 U.S.C. § 362(b)(4) exempts from the automatic stay set forth in 11 U.S.C. §§ 362(a)(1), (2),(3), and (6):

> the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

fundamental purpose of the regulatory exception to the automatic stay is to enable regulatory agencies to continue to develop and enforce the laws entrusted to them.[180] Debtors may not frustrate "necessary governmental functions by seeking refuge in bankruptcy court."[181] Pursuant to the regulatory exception, government agencies may adopt and enforce regulatory orders against debtors in bankruptcy, including but not limited to holding hearings and actually setting the amount of liability for violating a regulatory order, but the agency must file a claim in the bankruptcy court in order to collect on a monetary judgment or fine that it adopts and may not take independent steps to demand or seek payment from the debtor outside of the bankruptcy court's claim process.[182]

76. The *June 2009 Further Notice*, which focused on clarifying the cost-sharing and reimbursement obligations set forth in prior Commission orders, was designed to further the Commission's long stated public policy goals of efficient management of the radio spectrum.[183] The *June 2009 Further Notice*, therefore, falls squarely within the regulatory exception to the automatic stay. DBSD's arguments to the contrary are without merit. The declaratory ruling, which includes matters of Commission policy related to but not subject to the *June 2009 Further Notice*, likewise fits the regulatory exception: the Commission has no pecuniary interest in the outcome and is acting in the public interest for a public purpose.

77. Based on the legal standards above, we agree with Sprint Nextel that the general rulemaking proceeding is not subject to the automatic stay merely because one of the parties to the rulemaking is a debtor in a bankruptcy case. As Sprint Nextel notes, this rulemaking has resulted in the promulgation or clarification of rules that will apply to all parties in the 1990-2025 MHz band.[184] This Report and Order and Declaratory Ruling applies to a variety of entrants, including TerreStar (an MSS licensee that is not in

[180] The legislative history of 11 U.S.C. § 362(b)(4) is instructive as to the meaning of "police and legislative power." The House Report on the 1978 Bankruptcy Reform Act states:

> paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 343 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 51-52, reprinted in 1978 U.S.C.C.A.N. 5787, 5838, 5963, 6299.

[181] *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991) (quoting *United States v. Seitles*, 106 B.R. 36, 38-40 (S.D.N.Y. 1989); *See also EEOC v. Le Bar Bat, Inc.*, 274 B.R. 66 (S.D. N.Y. 2002) (automatic stay did not apply to EEOC action to prevent employment discrimination).

[182] *See United States v. Commonwealth Cos., Inc.*, 913 F.2d 518, 522, 523 (8th Cir. 1990) (where an agency is authorized to enforce its rules and laws by setting a fine, the action by the agency to determine the appropriate amount of liability is exempt from the automatic stay, but the agency cannot collect the fine on its own order, but must file a claim in bankruptcy court to seek payment of the monetary amount.). *City of New York v. Exxon Corp*, 932 F.2d at 1025, 1026 (City's action against Chapter 11 debtor under the CERCLA to recover costs of removing hazardous waste from its landfills came within the regulatory exception, but once a judgment has been issued, collection of that judgment must be handled within the claims process of the bankruptcy court); *In re Quinta Contractors, Inc.*, 34 B.R. 129 (Bankr. M.D. Pa. 1983) (proceedings by the Secretary of Labor to establish the amount of the debtor's liability under the Davis-Bacon Act are excepted from the automatic stay).

[183] *See June 2009 R&O*, at ¶ 2 ("All of the matters addressed herein relate to our fundamental goals of completing the relocation of BAS operations from the 1990-2025 MHz band and providing for the operation of new services on those frequencies").

[184] *Sprint Opposition* at 6.

bankruptcy), and future licensees of AWS services.[185] Regardless of DBSD's bankruptcy, the Commission can, and must, take regulatory steps to clarify the cost sharing and reimbursement obligations of these entities.[186] The Commission's ability to perform its regulatory functions would be impeded if it were to halt its proceedings whenever a regulated entity that might be affected by a Commission order or rulemaking proceeding goes into bankruptcy.[187]

78. Nor is there any basis to exclude the DBSD debtors from the effects of this Report and Order and Declaratory Ruling merely because it *may* result in a financial impact on one or more of those parties.[188] Moreover, under the well-established principles of the regulatory exception to the automatic stay, a regulatory body can implement its public policies, and even adopt orders directed at particular industry participants, without violating the automatic stay so long as the regulatory body does not seek to enforce a money judgment outside of the bankruptcy claims process.[189]

79. We reject DBSD's contention that the regulatory exception does not apply because, according to DBSD, the *June 2009 Further Notice* will effectively adjudicate or resolve the reimbursement dispute between Sprint Nextel and DBSD.[190] The express purpose of this Report and Order and Declaratory Ruling is to further the policy goals of promoting more efficient use of spectrum and permitting the introduction of new services. This Report and Order and Declaratory Ruling promotes

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[185] *See Teacher's Ins. & Annuity Assoc. of Am. v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) (automatic stay does not extend to non-bankrupt co-defendants); *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 789 (8th Cir. 2009) (same). The rules adopted here apply broadly to all parties, whether or not in bankruptcy. The declaratory ruling also applies to parties whether or not in bankruptcy. For example, the conclusion that under the current rules the new entrants' cost sharing obligation extends to either the conclusion of the 800 MHz reconfiguration or true-up is true for the obligation of all the MSS and AWS entrants. The conclusion concerning affiliate liability applies to all the affiliates of DBSD, including parent company ICO Global, which is not in bankruptcy.

[186] We note that DBSD claims that discussion in the *June 2009 Further Notice* about how the proposed regulations will apply to Sprint Nextel's claims against DBSD makes clear that the intent is to functionally adjudicate Sprint Nextel's claims against DBSD, and that the *June 2009 Further Notice* is subject to automatic stay regardless of how it is denominated. *DBSD Petition* at 6. We do not find this sweepingly broad construction persuasive.

[187] Indeed, as Sprint Nextel has argued (*Sprint Reply* at 3-4), the automatic stay under 11 U.S.C. § 362(a) only bars "proceedings against the debtor" or actions to "obtain" or "exercise control" over the property of the bankruptcy estate. The *June 2009 Further Notice* proceeding is not even barred by the automatic stay under the terms of Section 362(a) because it is not focused on the debtor or the debtor's property, but is a general rulemaking proceeding applicable to all similarly situated entities. *See Lacoquille Inv. Co.*, 44 B.R. 731, 732-33 (Bankr. S.D. Fla. 1984) (enactment of a municipal zoning ordinance amendment that arguably adversely affected the use and value of debtor's real property was not barred by the automatic stay because it was exercise of the municipal legislative power, not a judicial or administrative proceeding directed against the debtor or its property); *Albion Disposal, Inc.*, 217 B.R. 394, 406 (W.D.N.Y. 1997) (facially neutral zoning ordinance that barred all landfills from the city did not violate the automatic stay, notwithstanding debtor's claim that the ordinance "targeted" debtor's property).

[188] DBSD's assumption that the Commission's final order would adopt positions that favor Sprint Nextel was mere speculation. The Commission only made tentative findings in its *June 2009Further Notice*, and the purpose of the *Further Notice* was to determine whether or not to adopt rules and policies implementing the tentative findings. The outcome was not preordained. *See Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 40-41 (1991) (the "possibility" that the outcome may be unfavorable to the debtor does not justify staying a regulatory enforcement proceeding).

[189] *See New York v. Mirant New York, Inc.*, 300 B.R. 174, 179-81 (S.D. N.Y. 2003) (regulatory exception to the automatic stay applied to entry of a consent decree requiring the debtor to bring its plant into compliance with Clean Air Act and state environmental laws, notwithstanding the debtor's argument that it would have to expend millions of dollars to comply with state's consent decree).

[190] *DBSD Petition* at 3.

the general regulatory policies of the Commission, but does not seek to determine the pecuniary interest of any individual debtor or creditor. The rulemaking and declaratory ruling apply to a variety of industry participants, not just to DBSD, and are applicable to all similarly situated entities. Moreover, the final result of this Report and Order and Declaratory Ruling is not a judgment for or against Sprint Nextel on its particular reimbursement claims. Now that the obligations are clarified, it is up to Sprint Nextel to pursue its claims. With respect to the DBSD bankruptcy, any proceedings by Sprint Nextel on a claim for monetary recovery against a debtor in the DBSD bankruptcy case is a matter for the Bankruptcy Court and is not addressed in this Report and Order and Declaratory Ruling. Thus, the Commission's rulemaking and issuance of a declaratory ruling have remained within the limits of the regulatory exception to the automatic stay.

80. In addition, the results of this Report and Order and Declaratory Ruling meet both the pecuniary purpose and public policy tests limiting the regulatory exception. With respect to the pecuniary purpose test, the Commission is acting solely in its regulatory capacity and has no creditor interest in the DBSD bankruptcy case or in the outcome of the Sprint Nextel-DBSD dispute. The Commission has not filed a claim in the DBSD case and has affirmatively represented to the Bankruptcy Court that it has no pecuniary interest in the case. In addition, based on Sprint Nextel's public filings, Sprint Nextel has represented to both the Commission and the Bankruptcy Court that Sprint Nextel's band clearing costs are high enough that it does not expect to have to make an anti-windfall payment as set forth in the *800 MHz Order*, so that Sprint Nextel will likely have no further payment obligation to the U.S. Government.[191] In short, Sprint Nextel's obligations to the U.S. Treasury will not likely be affected by the outcome of this proceeding. Thus, the pecuniary purpose test is satisfied and there is no impediment to the Commission's exercise of its regulatory powers under Section 362(b)(4).

81. The Commission's actions here also meet the "public policy" test.[192] The Commission's actions are not designed to protect the claim of Sprint Nextel or any other creditor against the DBSD bankruptcy estates. Clarifying the cost-sharing and reimbursement obligations associated with clearing the band for new entrants is an essential part of the Commission's implementation of its prior orders. Any benefit to individual industry participants will be wholly incidental to the Commission's stated purpose, and "outweighed" by the Commission's clearly stated public policy purpose.

82. In arguing that the automatic stay should apply to this rulemaking, DBSD points out that this rulemaking involves specific reimbursement claims that Sprint Nextel has filed in the Eastern District of Virginia against DBSD.[193] That court has stayed its proceeding under the primary jurisdiction doctrine and referred pending claims "to the Federal Communications Commission for resolution."[194] Although the court has referred the claims to us for "resolution," we emphasize that the actions we take here are not an adjudication of the claims that Sprint Nextel, DBSD, and TerreStar have raised in that court proceeding. Instead, we clarify our relocation rules to assist the parties, as well as the court, in determining the responsibilities of each party in the ongoing BAS relocation

6. Retroactivity

83. DBSD argues that the cost sharing requirements proposed in the *June 2009 Further Notice* would be impermissibly retroactive.[195] In addition, ICO Global argues, in an *ex parte* letter, that defining

[191] Letter from Sprint Nextel, WT Docket 02-55, filed June 25, 2008, at 7 n.24.

[192] The public policy test distinguishes between proceedings that effectuate public policy and those that adjudicate private rights. *See NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986).

[193] *DBSD Petition* at 2.

[194] *Sprint v. New ICO Satellite Services*, Case No. 1:08cv651 (E.D. Va. Aug. 29, 2008).

[195] *DSBD Comments* at 9-13; *DBSD Reply* at 3-5.

it now as an "entrant" or a "licensee" would impermissibly impose retroactive liability.[196] Sprint Nextel responds to DBSD that the proposed requirements would not be retroactive because they would not alter the MSS operators' obligations.[197] In addition, Sprint Nextel answers ICO Global's retroactivity argument by asserting that when an agency clarifies that a given rule applies to certain types of parties, such a clarification does not have any impermissibly retroactive effect.[198]

84. As indicated above, the question about cost sharing requirements that we are resolving on the rulemaking side of this proceeding involves when the MSS entrants' obligation to share the costs of BAS relocation ends, not whether they are under such an obligation. On the declaratory ruling side of the proceeding, we explained that under the requirements set out in the *800 MHz Order*, the MSS operators incur a cost sharing obligation if they enter the band before the 800 MHz band reconfiguration or true-up process is complete. Once incurred, the operator's reimbursement obligation continues until discharged by payment or cut off by intervening events. Because the 800 MHz rebanding process has unfolded in unexpected ways, the precise timing and nature of the triggering events that would cut off these obligations was unspecified, and, under these circumstances, the exact dates that the MSS operators' ongoing payment obligations would terminate were not set.

85. To the extent our clarification of the triggering events for termination of the payment obligations constitutes a new or modified rule, it would be considered primarily retroactive only if it changed the past legal consequences of past actions.[199] This clarification, however, has worked no change in the legal consequences (*i.e.*, incurrence of the reimbursement obligation) of the MSS operators' past actions (*i.e.*, entering the band). Moreover, the clarification does not change how the MSS operators would have been treated if the band reconfiguration had proceeded according to plan. Since it did not, however, the circumstances that would have relieved the MSS operators of their payment obligations did not come about, leaving them with these obligations intact and the manner of their termination (other than for payment) unspecified. In taking action now to establish a firm date in the future (December 9, 2013) that will cut off the MSS operators' cost sharing obligations, we are acting prospectively.

86. Also on the declaratory ruling side of this proceeding, we explain how the term "entrant" as used in prior Commission orders and regulations is applicable to BAS relocation costs. We do not make any determination concerning the correct application of our decision to particular parties.

IV. PROCEDURAL MATTERS

87. The Final Regulatory Flexibility Analysis, required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, is contained in Appendix A.

V. ORDERING CLAUSES

88. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332, this Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order IS ADOPTED and will become effective 30 days after publication in the Federal Register.

89. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 301,

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[196] *ICO Global August 2 Ex Parte Letter* at 8-10.

[197] *Sprint Reply* at 17-20.

[198] *Sprint August 6 Ex Parte Letter* at 3-4.

[199] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1998) (Scalia J. concurring); *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001).

303(c), 303(f), 303(g), 303(r), 303(y), and 332, this Declaratory Ruling IS ADOPTED and will be effective upon release.

90. IT IS FURTHER ORDERED that the Petition for Stay filed by New DBSD Satellite Services G.P. IS DENIED.

91. IT IS FURTHER ORDER that the Commission SHALL SEND a copy of this Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making* (*FNPRM*).[2] The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA.[3] No commenting parties specifically addressed the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[4]

A. Need for, and Objectives of, the Proposed Rules.

2. In this Fifth Report and Order, Eleventh Report and Order, and Sixth Report and Order and Declaratory Ruling (collectively, Report and Order), we modify and clarify the Commission's requirements for the new entrants to the 1990-2025 MHz band to share the cost of relocating the incumbent BAS licensees from that band. The BAS incumbents have been removed from the 1990-2025 MHz band to make way for Sprint Nextel, MSS entrants, and future AWS licensees. Sprint Nextel, who will occupy the 1990-1995 MHz spectrum, completed relocation of the BAS incumbents from the band on July 15, 2010. The MSS entrants (DBSD and TerreStar), who will occupy the 2000-2020 MHz spectrum, have both launched satellites. The AWS licenses for the 1995-2000 MHz and 2020-2025 MHz bands have not yet been issued.

3. The cost sharing requirements for the BAS relocation must be modified because circumstances surrounding the relocation have significantly changed since the requirements were adopted. When the current cost sharing requirements were adopted in 2004, Sprint Nextel was expected to have completed the BAS transition by September 7, 2007; one or both of the MSS entrants was expected to have entered the band and incurred a cost sharing obligation to Sprint; the reconfiguration of the 800 MHz band, which Sprint Nextel was also undertaking, would have been completed by June 26, 2008; and Sprint Nextel was expected to be able to receive credit for the BAS relocation costs not reimbursed by MSS and AWS licenses toward the value of spectrum it was receiving. None of these assumptions has in fact been correct. Furthermore, the current requirements have a number of ambiguities, such as not specifying a standard for determining how MSS and AWS licenses incur a cost sharing obligation to Sprint Nextel and not specifying when reimbursement of BAS relocation expenses is to occur.

4. The Report and Order concludes that Sprint Nextel may not both receive reimbursement for cost sharing from other new entrants and receive credit for the same relocation costs against the value of the spectrum it is receiving. The MSS and AWS entrants can incur a relocation obligation until the band relocation rules sunset on December 9, 2013. The Report and Order further concludes that an MSS entrant will incur an obligation to reimburse Sprint for BAS relocation costs when it certifies that its satellite is operational for purposes of meeting its operational milestone. As for AWS licensees, the Report and Order concludes that AWS entrants will incur a cost sharing obligation upon grant of their long form application for their licenses. The Report and Order decrees that Sprint Nextel may provide a new entrant with documentation of the relocation expenses for which reimbursement is owed only after the new entrant has "entered the band" and therefore incurred a cost sharing obligation. The new entrant

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, ET Docket No. 00-258 and ET Docket No. 95-18, *Report and Order and Order and Further Notice of Proposed Rulemaking*, 24 FCC Rcd 7904 Appendix C (2009).

[3] *See Id.* at ¶ 1.

[4] *See* 5 U.S.C. § 604.

will then have thirty days to pay the amount owed Sprint Nextel, unless the parties agree to a different schedule.

5. In addition, the Report and Order concludes that the MSS entrants' reimbursement obligation to Sprint Nextel should continue to be limited to a *pro rata* share of the costs of relocating BAS in the thirty largest markets (by population) and all fixed BAS links. The Report and Order requires Sprint Nextel to share with other new entrants from whom it is seeking reimbursement, information about its relocation cost as documented in its annual external audit and as Sprint Nextel provides to the Transition Administrator of the 800 MHz transition, copies of frequency relocation agreements that it has with any BAS incumbent for which it is seeking cost sharing, and third-party audited statements of expenses associated with the BAS relocation.

B. Legal Basis.

6. The proposed action is taken pursuant to Sections 4(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[5] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[7] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[8]

8. The proposed rule modifications will affect the interest of the new entrants to the 1990-2025 MHz band: MSS, Sprint Nextel, and future AWS entrants to the band.

9. ***MSS.*** There are two MSS operators in the 1990-2110 MHz band. These operators will provide services using the 2000-2020 MHz portion of the band. The SBA has developed a small business size for Satellite Telecommunications, which consist of all companies having annual revenues of less than $15 million.[9] Neither of the two MSS operators currently has revenues because, while they both have operational satellites, they are not providing commercial service. However, given that as of December 31, 2008, these MSS operators had assets of $1.341 billion and $664 million, respectively, we expect that both of these companies will have annual revenue of over $15 million once they are able to offer commercial services.[10] Consequently, we find that neither MSS operator is a small business. Small

[5] 5 U.S.C. § 603(b)(3).

[6] 5 U.S.C. § 601(6).

[7] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[8] Small Business Act, 15 U.S.C. § 632 (1996).

[9] 13 C.F.R. § 121.201, NAICS Code 517410.

[10] TerreStar Corp., SEC Form 10-K 2008 Annual Report, filed March 12, 2009 at F-2; ICO Global Communications (Holdings) Limited, SEC Form 10-K 2008 Annual Report, filed March 31, 2009 at 52. ICO's subsidiary which (continued....)

businesses often do not have the financial ability to become MSS system operators due to high implementation costs associated with launching and operating satellite systems and services.

10. ***Wireless Telecommunications Carriers (except Satellite).*** Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[11] Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."[12] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[13] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[14] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[15] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[16] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[17] Thus, we estimate that the majority of wireless firms are small.

11. ***AWS.*** The AWS licenses have not been issued and the Commission has no definite plans to issue these licenses. Presumably some of the businesses which will eventually obtain AWS licenses will be small businesses. However, we have no means to estimate how many of these licenses will be small businesses.

12. ***Sprint Nextel.*** Sprint Nextel as a new entrant to the band will occupy spectrum from 1990-1995 MHz. The Third Report and Order grants Sprint Nextel a waiver of the deadline by which it must relocate the BAS, CARS, and LTTS incumbents from the 1990-2025 MHz portion of the band. Sprint Nextel belongs to the SBA category Wireless Telecommunications Carriers (except satellite).[18] Businesses in this category are considered small if they have fewer than 1500 employees.[19] As of December 31, 2009 Sprint Nextel had about 40000 employees.[20] Consequently, we find that Sprint

(Continued from previous page)
controls its satellite covering the United States is currently in bankruptcy. ICO Global Communications (Holdings) Limited, Form 8-K, filed May 15, 2009.

[11] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[12] U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[13] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[14] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization," Table 5, NAICS code 517211 (issued Nov. 2005).

[15] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[16] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization," Table 5, NAICS code 517212 (issued Nov. 2005).

[17] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[18] 13 C.F.R. § 121.201, NAICS Code 517210.

[19] *Id.*

[20] Sprint Nextel Corp., SEC Form 10-K 2009 Annual Report, filed Feb. 26, 2010 at 12.

Nextel is not a small business.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.

13. The Report and Order clarifies the existing obligation of new entrants to reimburse the party who relocates BAS incumbents for a portion of the relocation costs. It specifies that an AWS entrant incurs a cost sharing obligation upon grant of the long-form application for its license and an MSS entrant incurs an obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone. The reimbursement obligation continues until the December 9, 2013 band sunset date. The Report and Order also specifies when payment of relocation cost is due.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[21]

15. Most of the decisions in the Report and Order address cost sharing obligations between the MSS entrants, future AWS entrants, and Sprint Nextel for relocating the BAS incumbents. Of these new entrants only the future AWS entrants may be small entities. Because no licensing scheme for the AWS spectrum has been determined, we are unable to determine how many (if any) of these future licensees may be small entities. It is also difficult to determine how the impact of the cost sharing rules on them may be reduced.

16. All of the new entrants benefit from the clarity that the Report and Order brings to the cost sharing rules. The new entrants can now be certain how they incur a cost sharing obligation, what expenses are eligible for cost sharing, when they must make payment, and when the obligation will end if they do not incur a cost sharing obligation (*i.e.* they do not enter the band by the sunset date). In this way the cost sharing requirements adopted in the Report and Order benefit those future AWS entrants who may be small entities.

17. Under the cost sharing rules, Sprint Nextel may receive cost sharing from the other new entrants to the band. One possible alternative to lessen the impact on new entrants who are small entities would be to reduce the amount that small entities are required to reimburse other entrants for the BAS relocation. This would in effect require Sprint Nextel to subsidize the small entities. This would be unfair because Sprint Nextel did not volunteer to subsidize the small entities, the small entities would likely be direct competitors of Sprint Nextel, and Sprint Nextel has spent a large sum of money on the BAS transition. Sprint Nextel is only receiving 5 megahertz of the 35 megahertz of spectrum and up to this point has shouldered the entire cost of the BAS transition. Not requiring the future AWS entrants who are small entities to pay their share of the relocation cost would also harm the Commission's future relocation policies. In the future licensees are not likely to volunteer to relocate incumbents if they are forced to subsidize other licensees.

18. Another alternative would be to let the small entities pay their cost sharing obligation on the installment plan.[22] Allowing use of installment payments would in effect make the party who relocated

[21] *See* 5 U.S.C. § 603(c).

[22] We rejected requiring the MSS entrants to pay their obligation under an installment plan. *See* ¶ 66, *supra*.

the incumbents a creditor of the small entity. This would be more costly for the party who relocated the incumbents because they will receive payment later. It would also subject the relocating party to increased risk of non-payment. There is also no record as to what specific installment plan could be adopted.

19. Because of these drawbacks, we do not believe either of these alternatives is appropriate. Furthermore, because no AWS licenses have been issued no small entities currently have a cost sharing obligation for the BAS transition. When AWS licenses are issued at some future date, the potential licensees will know for certain that they face a cost sharing liability because of the refinement of the cost sharing rules adopted in this Report and Order.

F. Federal Rules that May Duplicate, Overlap or Conflict with the Proposed Rules.

20. None.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN
APPROVING IN PART; CONCURRING IN PART

Re: *Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service, ET Docket No. 95-18*

While I approve of most of the findings in this item, I respectfully concur. In my opinion, the Commission has a strong institutional interest in ensuring that its relocation and cost reimbursement policies are correctly applied to the specific factual issues in this case. Therefore, while I respect that my colleagues may reasonably conclude otherwise, I believe that the public interest would have been better advanced by having the Commission decide the particular issue of whether ICO Global is liable to Sprint Nextel.